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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 880

FRANK E. AIPLE, DOING BUSINESS AS AIPLE TOWING COMPANY,

Petitioner,

vs.

CENTRAL SOYA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Respondent opposes the petition for a Writ of Certiorari because the decisions of the Court of Appeals and of the District Court were correct; because the only questions involved are whether or not the fact findings of the trial court were correct or clearly erroneous; because the decision fully conforms to the opinions of this Court, is not in conflict with decisions of other circuits; and finally because no question of law is involved.

OPINIONS BELOW

The decision of the District Court consists of the findings of fact and conclusions of law, pages 29 to 34 of Appellant's Appendix. The opinion of the Court of Appeals for the Seventh Circuit, affirming the trial court is reprinted

in Petitioner's Appendix "A" and is reported in 325 F. 2d 129.

QUESTION PRESENTED.

The only actual question involved and offered for review by the Petition for Certiorari is whether the findings of fact made by the trial court were clearly erroneous.

STATEMENT

Virgil Crass sued Petitioner, his employer, in Admiralty for personal injuries suffered while working as a crew member of the pusher type towboat "MANITOU." He alleged that his injuries were caused by negligence of the owner of the towboat, its agents, officers, and employees in several respects, including failure to act with due care, insufficient lighting, inadequate working force, improper supervision and unseaworthiness of the towboat and its tow (App. 3). At the time of the accident the tow consisted of three river barges, one of which was Barge AD 160, unmanned, without motive power and owned by Respondent Central Soya, who had employed Petitioner to move the barge as an independent contract tower. The barge had been towed to a landing a few miles below St. Louis and docked on that stage of its voyage by another independent contract tower. At this landing it was taken into a larger tow by Petitioner's towboat "MANITOU." When this taken in tow one of the cargo hatch cover doors was missing, although this fact was not known to the Respondent Central Soya (Appellee's Appendix 19). At St. Louis the Petitioner's towboat left some of the barges of a more numerous tow, rearranged the three remaining barges and proceeded on up the Mississippi River pushing the three barges, including the AD 160 (App. 25, 92, 113).

Before the accident occurred Petitioner's towboat had been towing (pushing) Barge AD 160 for two days and two nights, during which time the fact that the cover was missing was obvious. One of petitioner's mates admitted he had observed that the cover was missing (Finding 9,

App. 31) (App. 132, 133). Virgil Crass and some other crew members had passed within two feet of the open hatch on numerous occasions in daylight (Findings 11, App. 31). Although the hatches are at a higher level than the line decks and gunwales where the crew work the sloping hatches are readily visible. The Respondent Central Soya had no employees traveling with the tow and did not have knowledge that the hatch cover was missing from its unmanned Barge AD 160. The trial court found that the injuries suffered by Virgil Crass from falling into the open hatch were caused by the negligence of Petitioner and contributory negligence of Virgil Crass; that Barge AD 160 was seaworthy and fit for the intended purpose, properly equipped, and fit to be towed and that Appellee Central Soya was not negligent. (Findings 15, 16, 22; App. 32, 33).

Virgil Crass recovered a judgment of $60,000.00 against Petitioner, his employer, which has been paid, so that there now remains only the question whether the respondent (Barge owner) who had complied with its contract that the barge be seaworthy and otherwise fit to be towed, should indemnify the Petitioner (tower) whose failure to perform towage in a workmanlike manner and whose negligence was the proximate cause of the accident.

ARGUMENT AND FURTHER STATEMENTS OF FACT.

As already stated, the only actual question presented to this Court by the Petition for Certiorari is whether the findings of fact made by the trial court were clearly erroneous. One of the three judges who reviewed the case in the Court of Appeals thought so, calling the missing hatch cover "a gaping hole;" a term which is enthusiastically used at least six times in the petition.

Virgil Crass did indeed fall through the "gaping hole," but this was not in a work area, was clearly visible and had been gaping at Petitioner for more than two days and nights while Petitioner was towing the barge. In order to fall into this opening Virgil Crass had to climb up from the work area of the deck onto the sloping hatch covers which by their very construction were not intended to be used as work areas. The Respondent owned the towed barge but did not know that the hatch was open. The trial court found that the sole proximate cause of the accident was the joint negligence of Petitioner and Virgil Crass himself, that the barge was in fact seaworthy and fit to be towed.

The Petitioner seeks indemnity, but the evidence and the findings of fact definitely preclude it. The language of the towing contract that the barge should be "properly equipped and supplied and in all other respects fit and suitable to be towed" was complied with and both the trial court and Court of Appeals so decided. As the Court of Appeals stated "*The hatch covers here involved were neither intended for use as work areas nor located in a work area.*" Towboats may push a flotilla of anywhere from three to thirty or more barges at one time and it is customary for some or all of the empty grain barges to

be towed with hatch covers open, or partly open or entirely removed. Hatch covers on barges are quite different from open decks or from hatches on the decks of ocean going vessels, or lakers or navy vessels, which in some instances have been found by the triers of fact to be work areas. In the case at bar the undisputed evidence showed, that the trial court found that it was not unusual for empty grain barges, such as AD 160, to be taken in tow with hatch covers open or entirely removed, the purpose of hatch covers being to protect cargo from weather (Finding 3, App. 30, App. 134), that Respondent Central Soya could not have reasonably anticipated that hatch covers would be used as work areas (Finding 20, App. 33), which was not their purpose (Finding 6, App. 31). The trial court found further that personnel of a towboat customarily inspect towed barges to determine if there were defects or damage, that Petitioner did not follow the custom of inspecting the tow, and allowed and encouraged its crew to walk on hatch covers to string running lights (Findings 5, 6, App. 30, 31, and see Appellee's Appendix). The trial court found that Petitioner was negligent in failing to maintain an adequate inspection of its tow, directing and permitting the crew to use hatch covers for a purpose for which they were not intended (Finding 15, App. 32).

The reasons listed by Petitioner for granting the writ are all spurious.

1. The seaman did in fact recover in the case at bar. The question was not whether he could or could not recover but *who* was responsible under the facts of the case. The principle that equipment must be safe and suitable for its intended use is not abrogated or affected by this decision but has been clearly recognized. The teaching of *Mitchell v. Trawler Racer*, 362 U. S. 539, 550; 80 S. Ct. 961 (1960) is that a vessel owner is not obligated to furnish an accident free ship but to furnish a vessel and appurtenances reasonably fit for their intended use. That was done

in the case at bar and both the trial court and Court of Appeals so decided.

2. The cases cited by Petitioner as being in conflict with the case at bar all involved work areas, are clearly distinguishable and were distinguished on their facts by the Court of Appeals. For example, Petitioner cites *Shenker v. United States*, 322 F. 2d 622 (C. A. 2, 1963), and would have this Court believe that all structures called "hatches," no matter where placed or on what kind of floating craft are the same. Deck hatches on the seagoing naval vessel in the *Shenker* case are entirely different from the covers of grain barges such as AD 160 in the case at bar. In the *Shenker* case there was a finding of fact that walking on those hatches was consonant with shipboard procedure, which finding the Court of Appeals did not disturb, although expressing some doubts about the fact finding of unseaworthiness. In the case at bar the court found that Barge AD 160 was provided with unobstructed walkways and work areas and that the absence of the hatch cover did not render the barge unseaworthy (App. 33, Finding 22), that such hatch covers are not work areas (App. 32, Finding 15) and that respondent "could not have reasonably anticipated that the hatch covers would be used as work areas." Petitioner who had knowledge and control of the operation was at fault for directing and permitting the crew to use such covers for a purpose for which they were not intended (Finding 15).

3. The barge was in fact fit and suitable to be towed; reasonably fit for its intended use, and both the trial court and Court of Appeals so decided, contrary to what Petitioner asserts in its argument. Here again we have only a question of fact supported by uncontradicted testimony in the record.

4. Contrary to what has been stated in the petition the case at bar does not turn on validity or invalidity of indemnity clauses; rather the whole towing contract includ-

ing the indemnity clause was inapplicable to personal injuries of Petitioner's employees. Paragraph 5 of the contract was as follows:

> "provided, however, that nothing herein contained shall be construed as rendering owner or the tow and/or its cargo, if any, liable for any loss of, damage to, or expense in connection with the property of Aiple Towing Company or any third party or for loss of life or personal injury for which Owner or the tow and/or its cargo, if any would not otherwise be liable."

The trial court found as a matter of fact that the Respondent was not "otherwise liable" and the Court of Appeals affirmed. (See Findings 21, 22; App. 33.) That puts an end to the Petitioner's argument even if its strained construction of the towing contract were to be adopted. Furthermore, this is not a longshoring contract where a stevedore contractor is in charge of the work, has control of the operations, is charged with the duty to supervise and liable under a warranty of workmanlike service. Petitioner cites *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Company, Inc.*, No. 82, which was decided by this Court on March 9, 1964. In that case there had been a finding that equipment supplied by the contractor (Indemnitor) was defective "and unfit for its intended use," that the contractor was in control of the operations and that "liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury." Absence of negligence in supplying the equipment that was not fit for its intended purpose did not prevent the contractor from being liable under the particular language of the indemnity contract in that case. That decision is not in any way applicable to the actual decision in the case at bar. Here in our case the barge *was* fit for its intended purpose, it was not the Respondent but Petitioner who failed to take preventive measures and was best (in fact solely) situated to take them.

The decisions upholding certain indemnity clauses of

stevedoring contracts are clearly inapplicable as already explained because of the facts of the case at bar. They are also inapplicable because in the case at bar the contract was to tow a vessel, in which situation exculpatory and indemnity provisions are invalid under *Bisso v. Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629 (1955) and *Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967 (1963). In mentioning these towing cases we wish to make clear that whether *Bisso* was or was not wrongly decided (as implied by Petitioner) makes no difference to the case at bar because under the facts here indemnity is inapplicable regardless of the nature of the service performed by Petitioner.

If the hatch cover had been at work areas and *if* the shipowner had been held liable by the trier of fact on principles of unseaworthiness, and *if* the indemnity language had in fact been applicable, then and only then would the question of validity of indemnity clauses and exculpatory provisions of towing contracts become relevant. But all the ifs are *facts* that were decided against the Petitioner and are all clearly proved in the record in favor of Respondent. The Petitioner builds an ingenious house of cards as though the three *ifs* had been decided in his favor. But they were not, and there comes a time when the rehashing of these fact questions should end. That time has passed and there is no valid reason for this case being again reviewed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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